No. 2804

# In the United States Circuit Court of Appeals

## For the Ninth Circuit

IN THE MATTER OF DAVID JACOBS and ISAAC JACOBS, Copartners doing business as JACOBS BROS.,

*Bankrupts,*

DAVID JACOBS and ISAAC JACOBS,

*Petitioners,*

vs.

S. T. HILLS, as Trustee of the Estate of DAVID JACOBS and ISAAC JACOBS, doing business as JACOBS BROS., Bankrupts,

*Respondent.*

Petition under Section 24b of the Bankruptcy Act to review and revise an order of the United States District Court for the Western District of Washington, Northern Division.

REPLY BRIEF OF PETITIONERS.

WALTER SCHAFFNER,
ROMAIN & ABRAMS,
*Attorneys for Petitioners.*
Postoffice Address: 531 Lyon Bldg., Seattle, Wash.

Sherman Printing & Binding Co. 71 Columbia Street, Seattle

No. 2804

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

IN THE MATTER OF DAVID JACOBS and ISAAC JACOBS, Copartners doing business as JACOBS BROS.,

*Bankrupts,*

DAVID JACOBS and ISAAC JACOBS,

*Petitioners,*

vs.

S. T. HILLS, as Trustee of the Estate of DAVID JACOBS and ISAAC JACOBS, doing business as JACOBS BROS., Bankrupts,

*Respondent.*

## REPLY BRIEF OF PETITIONERS

The brief filed on behalf of the respondent having an arrangement somewhat different from our original brief, we shall follow, for convenience, the arrangement of the brief of respondent in our reply.

Before discussing, however, the points raised by respondent, we think it proper to call the attention of

the Court to the fact that the supposed reference, to the facts in the case or to the evidence taken before the referee contained in several places in the brief is a reference to counsel's claim of what the evidence contained and is contained in his petition for review by the District Judge. Whether the statements of evidence therein contained are accurate or not, we have not taken the pains to investigate. They had no place in the petition for review, and certainly the *ex-parte* statements of counsel in a pleading as to what evidence is contained in the record will not be accepted by this Court as a binding statement of what the evidence really is.

## I.

We had supposed that on a petition to require the bankrupts to surrender property, the following facts only were in issue:

1. Is there property belonging to the bankrupt estate which has not been turned over to the trustee?

2. Has the bankrupt that property?

If the bankrupt has the property, it is absolutely immaterial whether he holds it in good faith or in bad faith. The question is wholly one of law. Is the property his or his trustee's?

We will concede that it is now a well established principle of law that in some criminal cases where the

question of intent is material, one may prove intent by showing acts similar to the one charged on the theory that the defendant is less likely to have committed a dozen acts with innocent intent than to have committed only one. This doctrine arose first in indictments for passing counterfeit coin. Manifestly, in that class of cases, it is easily understood that a defendant might have passed one counterfeit coin innocently, but when one continues to pile on other instances of counterfeit coin passed by the defendant, the innocence of the defendant seems less likely with each additional act. This doctrine has been extended somewhat in the late cases.

In the present case, however, there is no question of intent. As we have pointed out, the question is purely one of law. Had the bankrupts any property in their possession on the date the petition was filed which they did not turn over to their trustee? No matter how innocent they may have been, or no matter with what guilty intent they may have concealed it, the question still remains one of law unaffected by their intent.

There is no authority whatsoever for saying that the evidence as to the concealment of the merchandise was admitted by the referee. The reference of counsel to the record is again to his own statement of what the evidence contained and not to any report of the referee or finding of the Court. An examination of the report

of the referee found on pages 15-17 of the record shows that he carefully avoided making any such finding.

Counsel's argument that such other offense would aid the Court in arriving at a moral certainty that fraud was committed again confuses the issue in this case. As we have before pointed out, the question of fraud is wholly immaterial.

II.

The only argument of counsel under this heading is that the finding shows that the bankrupt has committed fraud. If he has, the statute provides a remedy. The record shows that his creditors have already had a portion of the relief which the law gives them. The discharge of the bankrupt has been denied. If he has been guilty of any other fraud which is punishable by the Act, there is a way to reach him. Certainly this Court is not going to permit itself to be used as a club in blackmailing the bankrupt into paying $3000 to his trustee which the trustee is not entitled to, because the bankrupt has been guilty of some other fraud. Once more, we must call the attention of the Court to the attempt of counsel to have the Court believe that there is in the record a statement of the facts or of the evidence produced before the referee by referring to his own pleading.

Nothing in the books could be more applicable to

the situation suggested by the brief of counsel than the words of Judge Seaman, in *In re Mayer,* 98 Fed. 840:

"For money or property traced to the possession or control of the bankrupt, concealed and withheld from the trustee, this provision is applicable, and must be summarily enforced. It is not applicable, however, to reach property beyond the present control of the bankrupt, and in the hands of third parties claiming title derived prior to the proceedings in bankruptcy, although the transaction is manifestly fraudulent. Nor can this means or provision be employed to punish for frauds committed by the bankrupt against the bankruptcy act, nor can it be used to coerce the bankrupt or transferees to make restitution of money or property previously transferred in fraud of the act. Frauds which are made criminal by the act are punishable only on conviction by the verdict of a jury, or on plea of guilty, and fraudulent transfers which have been consummated cannot be reached by this summary proceeding."

III.

To attempt to discuss each case cited by counsel under the second heading of his brief would be to extend this brief to a length which is wholly unwarranted. Almost all of the cases cited by counsel are contempt cases. This is particularly true of the Court of Appeal cases.

*Kirsner vs. Talliaferro,* 202 Fed. 52;
*Stewart vs. Reynold,* 204 Fed. 709;
*In re Rosser,* 105 Fed. 562.

The above are all contempt cases. In these cases it was held that before the bankrupt could be committed for contempt, there must be a finding that he had the

present ability to comply with the order. This does not touch the question raised in our brief that this question properly arises on a contempt proceeding and not on the petition to turn over.

We have carefully searched all the cases cited by counsel under this heading. In not a single case was the question ever raised or discussed. We shall not attempt to answer in detail all of the illustrations of counsel under this heading, practically all of his illustrations answer themselves.

V.

We have diligently searched our brief for anything whatsoever which might by the wildest stretch of imagination raise the point attributed to us by counsel under this heading, but we have been unable to find even the remotest suggestion of such proposition. It would, of course, be wholly inconsistent with our argument that the present ability of the bankrupts is immaterial.

VI.

We have attempted to show in our original brief that present possession of the property and present ability to comply with the order of the court are matters to be taken up in a contempt proceeding rather than in this. As we have shown, heretofore, the only cases in which this point was directly decided have

held that it is not proper at this stage of the proceeding. A number of cases are cited by counsel in which there were findings of present ability to perform. Many more could have been found. In none of them is the question raised as in this case. The only cases which appear to have raised this question are those in the Third Circuit, cited in our original brief.

VII AND VIII.

Once more counsel has raised a straw man for the purpose of knocking him down. We have made no contention in our brief as to the proposition discussed in this section. Except as a display of industry of counsel in examining cases, this part of his brief has no place in the case.

IX.

Although counsel makes no argument under this heading, there runs through all his brief an attempted reply to our argument that the findings did not support the conclusions. This is based largely on a reference to counsel's petition for review as stating the facts of the case.

In order to determine the proposition upon which the lower court disposed of the case, it is proper for the Court to examine the opinion of the trial Court.

*In re Pettingill & Co.* (C. C. A. 1st Circuit, 137 Fed. 840);

*Samuel vs. Dodd* (C. C. A. 5th Circuit, 142 Fed. 68).

If we examine the opinion of the trial Court we find that it is based wholly upon the difference in the tow inventories. All the Court did was to find that between these two inventories there was a discrepancy of the amount named in the order under review. In his order he made no finding as to the taking of any property by the bankrupts or the removal of any property by them.

An examination of finding No. nine in which the Court finds that the testimony is unsatisfactory will disclose that finding No. nine refers to the entirie period from February 3, 1916, down to the time that the property was taken by the sheriff. If this property was taken it must have been taken during that period, therefore, the finding of the Court that the testimony is unsatisfactory as to the disposition of the property during the time speciified in that finding refers directly to the matter in controversy herein, and is inconsistent with an order requiring the bankrupts to turn the property over.

We respectfully submit that the order of the District Judge under review should be reversed.

WALTER SCHAFFNER,
ROMAIN & ABRAMS,
*Attorneys for Petitioners.*